82-5989

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

WINFORD L. STOKES,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

Cause No. A-489

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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and

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OPINION BELOW

The opinion of the Missouri Supreme Court is recorded at 638 S.W.2d 715 (Mo. banc 1982). A copy of this opinion appears in Appendix A, infra.

JURISDICTIONAL STATEMENT

The petitioner, Winford L. Stokes, was sentenced to death on January 17, 1980, for the offense of Capital Murder.

The judgment and sentence of the trial court was affirmed in the Missouri Supreme Court on August 31, 1982. An application for rehearing was denied on October 7, 1982 (Appendix B, infra).

On November 29, 1982, this Court issued an order extending time to file petition for writ of certiorari up to and including January 5, 1983.

Due to the foregoing, Title 28 U.S.C. §1257(3) confers jurisdiction upon this Court to review the judgment below by writ of certiorari.

QUESTIONS PRESENTED

1. Does imposition of a sentence of death where notice of evidence in aggravation was given on the day of trial violate the petitioner's rights to effective assistance of counsel, trial by jury, maintain a plea of not guilty, due process of law, and constitute cruel and unusual punishment in view of the subsidiary circumstances detailed in this petition?

2. Does the action of the trial court in permitting the endorsement of twenty-five (25) additional witnesses on the day of trial and in overruling the petitioner's motion for a continuance where the state first gave notice of evidence in aggravation on the day of trial violate the petitioner's rights to effective assistance of counsel, trial by jury, maintain a plea of not guilty, and due process of law in view of the subsidiary circumstances detailed in this petition?

3. Does imposition of a sentence of death subsequent to the trial court's order precluding the petitioner from introducing the state's previous offer of a concurrent sentence on a reduced charge in evidence of mitigation violate the petitioner's rights to due process and equal protection of the law and constitute cruel and unusual punishment?

4. Does the imposition of a sentence of death upon a finding that the petitioner has a substantial history of serious assaultive criminal convictions, §565.012.2(1) RSMo (1978), violate the petitioner's rights to due process and equal protection of the law and constitute cruel and unusual punishment?

5. Does imposition of a sentence of death upon a finding that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind, §565.012.2(7) RSMo (1978), violate the petitioner's right to due process and equal protection of the law and constitute cruel and unusual punishment?

6. Does the imposition of a sentence of death upon a finding that the offense was committed for the purpose of receiving money or any other thing of value, §565.012.2(4) RSMo (1978), violate the petitioner's right to due process and equal protection of the law and constitute cruel and unusual punishment in view of the circumstances detailed in this petition?

7. Does the imposition of a sentence of death upon a finding that the petitioner was an escapee of custody at the time of the offense, §565.012.2(9) RSMo (1978), where there was no admissible evidence of such, violate the petitioner's right to due process and equal protection of the law and constitute cruel and unusual punishment?

8. Does imposition of a sentence of death under §§565.001-565.016 RSMo (1978) violate the petitioner's right to equal protection of the law and constitute cruel and unusual punishment

as this statute is applied and enforced by the courts in the State of Missouri?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V;

United States Constitution, Amendment VI;

United States Constitution, Amendment VIII;

United States Constitution, Amendment XIV.

[See Appendix C].

STATEMENT OF THE CASE

On June 12, 1978, a criminal indictment was filed in the Circuit Court of St. Louis County charging the petitioner with the offense of Capital Murder (L.F. 70). It should be noted that the statute cited, §559.005 RSMo (1969), had been declared unconstitutional in State v. Duren, 547 S.W.2d 476 (Mo. banc 1977), and while it may have been adequate to support a conviction, it could not support a sentence of death.

On July 13, 1979, one (1) year and thirty-one (31) days after the above filing, the petitioner was informed of the charge. The petitioner entered a plea of not guilty (L.F. 12).

On September 10, 1979, the petitioner entered pleas of guilty to the following charges in the City of St. Louis:

78-117 Robbery First Degree and Armed Criminal Action;

78-967 Murder Second Degree and Robbery First Degree;

78-609 Escaping Custody Before Conviction.

On cause numbers 78-117 and 78-967, the petitioner received concurrent sentences of fifty (50) years in the Missouri Division of Corrections (T. 351-53). The pleas and sentences recived in the aforementioned cases in the City of St. Louis were an aspect of a negotiated settlement of the petitioner's pending cases. It should be noted that the successful plea of September 10, 1979, was the petitioner's second attempt to enter such a plea.

The participation of the state's officers in St. Louis County in the aforementioned settlement consisted of the following:

1. a reduction of this charge from Capital Murder to Murder, Second Degree, and;

2. a recommendation of a sentence concurrent with the aforementioned fifty (50) year sentence upon a plea of

guilty to the reduced charge (T. 359-60).

On September 20, 1979, the petitioner attempted to complete the settlement in St. Louis County (T. 359-62). At that time, the petitioner determined to continue his plea of not guilty to the charge in issue. Pursuant to this transaction, the state withdrew its reduction of the charge and reinstated the original indictment (L.F. 18). The validity of the pleas of September 20, 1979, were dependent upon a compatible settlement of this charge, then pending in St. Louis County.

The petitioner's motion to dismiss the indictment on the basis of the incorrect statutory reference (L.F. 26) was heard and overruled on September 27, 1979 (L.F. 33). The state took no action in view of the incorrect citation.

The cause was called to trial on October 22, 1979, in Division No. 13 of the Circuit Court of St. Louis County, The Honorable John R. Rickhoff presiding (T. 1).

The state filed notice of evidence in aggravation on the day of trial (L.F. 58-59). Two of the four statutory aggravating circumstances alleged relied wholly or substantially on the pleas of September 10, 1979. This issue was raised before the trial court in the context the petitioner's motion to exclude the death penalty (L.F. 60-61, T. 7-10). In addition to raising his objection to the untimeliness of notice (T. 7), the petitioner suggested that the state's conduct was an effort to penalize him for failing to complete a settlement on September 20, 1981 (T. 7-8). Petitioner's motion to exclude the death penalty was overruled (T. 10). This motion was renewed after a verdict had been received and prior to the sentencing phase (T. 336). The issue was presented again at the hearing on petitioner's motion for a new trial (T. 359-62). This motion was overruled (L.F. 139).

The issue was properly preserved by the petitioner and the Missouri Supreme Court offered the following observations: that the prosecuting attorney made an oral declaration of his intention to seek the death penalty at the time of the unsuccesful attempt at settlement on September 20, 1979; that the aggravating circumstances as alleged the day of trial could have come as no surprise to the petitioner; that imposition of a harsher penalty following trial than was offered in plea negotiations is not violative of due process. In sum, the court failed to perceive prejudice and found "no denial of due process of constitutional significance." State v. Stokes, 638 S.W.2d 715, 720-21 (Mo. banc 1982).

Contemporaneous with the filing of notice of evidence of aggravation, the state filed an amended information in lieu of indictment alleging the conviction of a prior felony (L.G. 69). Contained thereon was a citation to the correct state capital murder provisions, §§565.001 and 565.008 RSMo (1978).

In the course of examining this document, petitioner's trial counsel discovered that the reverse contained an extensive list of witnesses, twenty-five (25) of whom had not previously been endorsed (L.F. 70-71). The petitioner asserted surprise and prejudice; he informed the trial court that he had been "proceeding under the indictment as filed and the endorsement of witnesses thereon. And these witnesses were basically police officers and none of the lay witnesses had been specifically endorsed" (T. 4).

The prosecuting attorney claimed that these witnesses had been endorsed, however, a review of the court's "file" established that this was not the case. At this point, the court's proceedings went off the record (T. 2). When the record resumed,

the prosecuting attorney offered that ". . . there had been a sheet. I don't know, evidently it had never gotten filed --" (T. 2). Thereafter, the state relied on the fact that police reports given the petitioner contained references to the witnesses just endorsed (T. 3-4). The trial court accepted such notice specifically and overruled petitioner's objection to the endorsement. Petitioner then made an oral motion for a continuance, ". . . in order to more properly look at the list of witnesses . . ." (T. 10). This motion was unopposed by the state: "Other than what I said before, in terms of particular request for continuance, I am not going to have any particular position on it" (T. 10). The petitioner's motion for a continuance was overruled (T. 10).

The issue was preserved by petitioner's trial counsel in his motion for a new trial (L.F. 120-21). He reminded the court of the need to reconsider trial strategy and to properly prepare cross-examination.

In the course of the trial, eleven (11) witnesses testified for the state. Of these witnesses, five (5) were drawn from the list of twenty-five (25) previously unendorsed witnesses. The evidence adduced in the trial of the petitioner for the murder of Pamela R. Benda on or about February 18, 1978, is reflected in the opinion of the Missouri Supreme Court, Stokes, supra, 717-719. The testimony of the five (5) unendorsed witnesses is summarized below:

Lucy Malone related that she was a long-time friend of the victim (T. 187-88). She identified State's Exhibits Nos. 47 and 49 as photographs depicting the victim's automobile (T. 188).

Romona Eunita Tabron testified that she was married to the petitioner at the time of the offense, but was not living

with him at that time. She had since obtained a divorce (T. 239-40). She related that she accompanied the petitioner on a trip to South Bend, Indiana, on March 3, 1978 (T. 240). Some time later, while the petitioner was being questioned in custody by the police, Romona Tabron was brought into the room to listen to the petitioner's statement of the circumstances of February 18, 1978. She contradicted the petitioner's account (T. 240-42). She further identified State's Exhibit No. 67, a pendant watch, as having been given to her by the petitioner (T. 242). It was suggested that this item had belonged to the victim (T. 225), however, no witness on behalf of the state testified to this and the fact was not established. Mrs. Tabron concluded her testimony by identifying State's Exhibit No. 49 as depicting an automobile driven by the petitioner in late February of 1978 (T. 243).

Myrna Savoldi was called and related that she was a friend and supervisor of the victim at her place of employment (T. 252-53). She identified State's Exhibit No. 59 as a knife which she had seen in the victim's kitchen on prior occasions (T. 253-54). It had been suggested that this knife had possibly been used in the commission of the offense (T. 173, 192).

Robert Benda related that he was the ex-husband of the victim and had custody of their three children (T. 256). He identified State's Exhibits Nos. 47, 48, and 49 as depicting the victim's automobile.

Wilbert Daniels was called by the state. He recounted that he had spent the afternoon and evening of February 18, 1978, in the company of the petitioner and a Darlene McCauley (late endorsement, not called, L.F. 71)(T. 259-60). This group had dinner at the Heritage House and later in the evening arrived

at a bar named "Some Place Else" (T. 260). During the course of the evening, Mr. Daniels observed the petitioner dancing with the victim. Shortly thereafter the victim introduced herself to Mr. Daniels (T. 261-62). When Mr. Daniels suggested leaving at about 11:30 P.M., the petitioner told him he would get a ride with the victim. The petitioner later related to Mr. Daniels that as he might not be able to get all the way home, he had better leave with Mr. Daniels. The victim then told Mr. Daniels that she would take the petitioner home (T. 262). The witness concluded his testimony by relating that he had never met the petitioner's wife, thus contradicting the account given the police by the petitioner (T. 263).

The Missouri Supreme Court dealt with the issue in the following wise:

1. An "off the record discussion established" the existence of a "second sheet" of endorsements somehow lost and viewed this as precluding a finding of bad faith.

2. The names of unendorsed witnesses had appeared in police reports.

3. The court "assumed" late endorsement of only five (5) additional witnesses.

4. The testimony of unendorsed witnesses was either "innocuous or capable of contemplation."

In sum, the court failed to perceive prejudice or denial of due process of constitutional significance, Stokes, id, 719-721.

The cause proceeded to deliberation and the jury returned a verdict of guilty for the offense of capital murder (T. 335).

In the course of a hearing on the upcoming sentencing phase of the trial, the state offered a motion in limine to

preclude the petitioner from offering evidence or argument concerning the pre-trial settlement negotiations in way of mitigation. Petitioner's exception to this motion was overruled and the motion was sustained (T. 339-40). The petitioner offered no evidence in mitigation (T. 347).

The petitioner argued that §565.006(2) RSMo (1978), in limiting evidence of mitigation by subjecting such to the laws of evidence, unconstitutionally exposed the petitioner to a sentence of death on an arbitrary and capricious basis (App. Br. 70-77). The Missouri Supreme Court simply noted that ". . . Since appellant offered nothing by way of evidence in 'mitigation' the argument is truly academic and is rejected." Stokes, supra, 724.

The state then offered its evidence in aggravation, the pleas of September 10, 1978 (T. 340-42). In the course of making his objections, the petitioner pointed out that he did not admit to any of the crimes alleged in aggravation and pointed out the date of the pleas and the fact that the pleas alleged in aggravation had occurred subsequent to the offense before the court (T. 343). The petitioner's objections were overruled (T. 344). Petitioner's original motion to exclude the death penalty was renewed (T. 336).

The state proceeded to offer evidence of the following four (4) aggravating circumstances (T. 345-47), all of which were found by the jury in assessing a sentence of death (L.F. 113):

1. ". . . the very nature of this crime is so violent, horrible, and inhuman that it involved torture. For that I ask you to recall the evidence as you heard it" (T. 345).

2. ". . . that the crime was committed for the purpose of monetary gain. Something of value, the stolen

car, the pendant" (T. 345).

3. ". . . that this defendant has a serious history of assaultive crimes. Not just any crimes but violent assaultive crimes." The aforementioned pleas of September 10, 1978 were offered (T. 346).

4. ". . . that he was an escapee of custody at the time he committed this murder." The aforementioned plea of September 10, 1978 was offered (T. 346).

This recitation was a reference to the court's Instruction No. 19 (L.F. 108, Appendix D). The instruction followed the statutory language of §565.012.2(1),(4),(7),(9) RSMo (1979), from which the prosecuting attorney departed in his offer of proof.

In his motion for a new trial, the petitioner attacked the submission of the second aggravating circumstance on the basis that it was vague and misleading and ambiguous (L.F. 126). The petitioner went on to attack the remaining instructions on a similar basis (L.F. 127-29), and the issues were preserved for review.

In the Supreme Court of Missouri, the petitioner attacked the constitutionality of submission of all of the aggravating circumstances offered on the basis that they were vague, misleading and permitted imposition of a sentence of death in an arbitrary, capricious, and unreasonable manner (App. Br. 85-90).

The Supreme Court of Missouri failed to address these issues, however, the following remarks contained in the dissent of Seiler, J., Bargett, J. concurring, should be noted:

"I reserve judgment on the issue whether the statutory aggravating circumstances taken from §565.012.2(1), 'whether the defendant has a substantial history of serious assaultive convictions'.

is unconstitutionally vague. Appellant raised and argued the point in his brief, but the principal opinion does not discuss the issue, and the facts here do warrant an application of pertinent constitutional tests. However, it should be pointed out that the Georgia Supreme Court, whose lead this court repeatedly follows in death penalty cases, held the 'serious assaultive convictions' aggravating circumstance unconstitutionally vague in Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976).

Stokes, supra, 725.

Finally, the petitioner attacked the imposition of a sentence of death under the current Missouri statutory scheme as constituting cruel and unusual punishment (L.F. 127-31, App. Br. 80-85). The Supreme Court of Missouri found this point to be without merit. Stokes, id. 724.

A R G U M E N T

I

The petitioner herein enumerates the circumstances which rendered the imposition of the death penalty a denial of due process of law, trial by jury, and effective assistance of counsel:

1. Notice of evidence of aggravating circumstances enabling imposition of the death penalty was first given on the day of trial.

2. §565.006.2 RSMo (1978) provides that, "Only such evidence in aggravation as the prosecution has made known to the defendant prior to his trial shall be admissible."

3. The state endorsed twenty-five (25) previously unendorsed witnesses on the day of trial, five (5) of these being among the eleven (11) witnesses who gave testimony.

4. The petitioner's motion for a continuance in view of the above, which was unopposed by the state, was overruled.

5. The evidence of aggravation relied on by the state placed substantial reliance on pleas, the validity of which depended upon a negotiated settlement of both the offenses used in aggravation and the cause on trial.

6. In connection with an attempted negotiated settlement of the cause on trial, the state had reduced the charge against the petitioner to Murder Second Degree and offered a recommendation of a sentence concurrent with sentences on offenses used in aggravation.

7. The petitioner's motion to exclude the death penalty was ovarruled.

Violations of a citizen's rights to due process of law, trial by jury and effective assistance of counsel of this magnitude must shock the conscience. Whether the preceding was the result of deliberate conduct or negligence by the state, such an assault on principles of fundamental fairness deeply undermines the integrity of the judicial process.

The circumstances now before this Court are no less egregious than those presented in Gardner v. Florida, 430 U.S. 349 (1977). In this case the jury imposed a life sentence and the trial court, with at least partial reliance on a confidential pre-sentence report, imposed death, id, 353. The Court held first that as death is a different kind of punishment from any other which may be imposed, it is of vital importance to the defendant and the community that such a decision be and appear to be based on reason rather than caprice and emotion. Secondly, the Court held:

> ". . ., it is now clear that the sentencing process, as well as the trial itself, must satisfy

the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. Mempa v. Rhay, 389 U.S. 128 (1967); Specht v. Patterson, 386 U.S. 605 (1967). The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." Gardner, id. 358.

The prosecuting attorney repeatedly told the trial court that at all times his office had considered the petitioner's case to be a death penalty case (T. 9, 362). He offered no explanation for his office's policy in reducing the charge and offering a settlement which would have resulted in the petitioner serving no additional time in custody for this offense. He offered no explanation for the extraordinary tardiness in filing notice of evidence in aggravation. He offered no explanation for the extraordinary delay in correcting the defective indictment. His explanation for the late endorsement of witnesses was unconvincing.

The quality of the procedures employed in the petitioner's case were appalling. The prejudice could not be more glaring.

After being held for considerably more than one year without counsel and without notice of the charges, the petitioner determined to accept a plea agreement covering this case and cases in the City of St. Louis. When ten (10) days after accepting a fifty (50) year sentence in the City, he failed to complete the arrangement, the prosecutor announced his intention

to seek death. No action was forthcoming until the day of trial. The petitioner was then denied a continuance, which was unopposed by the prosecution.

All of the pleas of September 10, 1979, used against the petitioner could have been withdrawn and rendered harmless had petitioner's counsel received proper notice. Notice the day of trial is no notice. Oral expression of intent which go unacted upon is no notice. The validity of the pleas in the City of St. Louis were contigent upon a plea in this case. Combined with the endorsement of twenty-five (25) additional witnesses at the same time, the petitioner's right to effective addistance of counsel at the sentencing phase of his trial is reduced to a farce and a mockery.

In view of the amount of improper, prejudicial evidence before the jury, whether the death penalty would have been imposed on admissible evidence alone is a matter of the sheerest and most unreliable conjecture.

Moreover, the issue of capital punishment should never have been allowed to go before the jury.

From its inception, the State of Missouri conducted this case in the most dilatory, slipshod and duplicitous fashion conceivable. Then, when the petitioner expressed reluctance to complete a plea bargain, the state made a public spectacle of its outrage (L.F. 60; P.T. 5), announced its intention to secure the petitioner's death, but still did not strike until the last minute. This is cavalier, capricious and an abomination. This is not a case where a defendant turns down five years and receives ten or even a thousand years from a jury. This is a case where the State of Missouri offers to give a crime away for nothing and then seeks death under the advantage of the most prejudicial circumstances it can orchestrate.

A defendant may not be penalized for exercising constitutional rights:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exervice of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

North Carolina v. Pearce, 395 U.S. 711, 725 (1968).

The right to trial by jury is hardly less fundamental than the right to appeal. No new evidence justifying the death penalty came to light after September 20, 1978, when the charge was reduced. The petitioner simply exervised his right to trial. See also Griffin v. California, 380 U.S. 483 (1965).

The Federal Kidnapping Act authorized death sentences only for defendants who proceed to trial. In holding that such a provision unconstitutionally impaired the free exercise of the right to trial by jury this Court stated:

> ". . . the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury.

> The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amentment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

United States v. Jackson, 390 U.S. 570, 581 (1968).

The petitioner suggests that the State of Missouri may not accomplish by practice what it would be precluded from accomplishing by legislation. It makes little difference to an individual facing execution whether his rights were violated by a legislative body or a prosecuting attorney's office. The actions of the state are both unnecessary and excessive for any legitimate purpose. If this case is allowed to set a pattern for imposition of the death penalty in Missouri, the confidence of the people in their fundamental rights must be severely diminished. There is no reliability to such conduct. The causes of those who would surrender their rights in this chilled atmosphere might never be heard. For such a reason alone, the petitioner must be heard.

Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976 (1979), rehearing denied 441 U.S. 937 (1979), is distinguishable. In the petitioner's case there was no possibility that he could be sentenced to death had he followed through with the settlement offered. Murder in the second degree is not a capital offense. There was no fair warning. A change in the state's position on punishment of the magnitude presented in this case required more than informal pronouncements.

Bordenkicher v. Hayes, 434 U.S. 357 (1978), is inapposite, the comments of the Court having reference to far more commonplace

criminal dispositions than that presented herein.

The issues raised by the petitioner do nothing to hinder the efficacy of plea negotiations. The risk of conviction of capital murder, which carries a minimum sentence of life without parole for a minimum of fifty (50) years, was sufficient legitimate coercion after September 20, 1978. This in itself was drastically more harsh than the state's offer of September 20, 1978. The petitioner has no quarrel with facing trial on a higher charge after withdrawal from plea negotiations. If, in the opinion of the prosecuting attorney's office, this crime was worth no real time on September 20, 1978, it was not worth death one month later.

The petitioner would clarify the procedural due process argument posed in the court below. In the case of capital punishment no balancing test is appropriate. There is no tension between the private interest of the litigant and the public interest of the state. Both alike have a primary and vital stake in the maintenance of procedures which are orderly, fair, consistent, and reasonable. The litigant's interest is obviously that it may save his life. The state's interest is that it will sustain a degree of legitimacy in enforcing a practice of questionable civility and dubious morality. Substantive due process requires no less in view of the awesome consequences. The opinion of Seiler, J., with concurrence of Bardgett, J., speaks eloquently to this point. State v. Stokes, 638 S.W.2d 715, 725-726 (Mo. banc 1982).

The prosecution of those accused of crime is a difficult task. The officers of the state simply must not be permitted to adopt what they perceive to be the standards of those they accuse.

The State of Missouri has no right to take any man's life under such circumstances as are presented in this case. The reasoning of the majority in the court below flies in the face of a concept of ordered liberty. A focus on ghoulish detail is no substitute for our Supreme Court's mandated review of whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. §565.014.3(1) RSMo (1978).

Since no evidence in aggravation was offered prior to trial, none was properly available to support a finding of aggravation permitting imposition of the death penalty. The Supreme Court of this state must not be permitted to nullify procedural safeguards enacted in our legislature to protect federal constitutional rights, §§565.006(2) and 565.016.1(2), by refusing to apply those rights.

Under the circumstances detailed herein, a sentence of death constitutes cruel and unusual punishment and must be set aside.

II

If a sentence of death is a different kind of punishment from any other that may be imposed, a capital murder trial where such a sentence is sought is a different kind of trial from any other that may be conducted. Identical due process and assistance of counsel considerations apply. The trial court did not need to refuse to allow the last minute endorsement. It needed only to grant a reasonable request for a continuance which was unopposed by the state. A trial court whose only interest is in compiling statistics of cases disposed is not competent to sit in judgment of a man's life. Assistance of counsel implies more than enabling a procedure in which rabbits are pulled out of

a hat. Notice of evidence of four (4) aggravating circumstances, the first clear indication to seek death, endorsement of twenty-five (25) additional witnesses all on the morning of trial, — a finding of guilt under such prejudice is worthless.

In this case, the lay witnesses who testified were the heart of the prosecution's case. The state's case was immeasurably enhanced by its use of these witnesses. Including those witnesses endorsed the day of trial, a total of fifty-eight (58) witnesses were endorsed (L.F. 70-71). The trial record is barren of anything which would lend support to the Missouri Supreme Court's assumption that only five (5) new witnesses were endorsed. State v. Stokes, 638 S.W.2d 715, 720 (1982).

Presumably all fifty-eight (58) of these people and a good many more were mentioned in police reports, the so-called "full discovery." This is not notice. The situation itself reeks of prejudice so that little more than the bare facts are needed to call for reversal. There was no notice as to who would be called. As it transpired, six (6) witnesses were called from the original list of thirty-three (33) of which the petitioner had notice. These witnesses were professionals whose testimony was sufficient to make a submissible case, if not a strong one. The use of the lay witnesses inevitably would effect such crucial decisions as whether the petitioner would testify. Issues such as how to deal with former wives and friends as hostile witnesses in a trial for the petitioner's life cannot be raised the day of trial. The testimony of the victim's former friends and family had considerable emotional impact. In sum, the testimony of these witnesses was neither "innocuous nor capable of contemplation," although much of it was objectionable and irrelevant.

An attorney who is put in a position where his effectiveness is precluded by surprise and want of time to prepare cannot

be required to indicate specifically what the result would have been had he been permitted to do his job. Demonstration of prejudice does not require such clairvoyance. Reference to the need to reconsider trial strategy and prepare cross-examination is appropriate. The record suggests that the performance of petitioner's trial counsel was impaired.

Generally, the matter of a continuance is within the sound discretion of the trial court. While not every denial of such requests are violative of due process, an arbitrary refusal will be, based on the circumstances of the case. See U.S. ex rel. Hussey v. LaValle, 302 F.Supp. 305, affirmed 428 F.2d 457, cert. denied 400 U.S. 995 (D.C.N.Y. 1969). Furthermore, the accused's constitutional right to assistance of counsel places an additional limit to such discretion, U.S. v. Waldman, 579 F.2d 649 (C.A. Mass. 1978). Every case must be judged on its own facts. The facts of this case require redress. There is no possible suggestion that the petitioner's request could have been made out of an improper motive or bad faith. On the contrary, deference to the petitioner was particularly called for where the state had allowed its claim to languish interminably. Stale claims are not favored by the law and far less so in criminal cases. Dickey v. Florida, 398 U.S. 30 (1971).

A number of cases deal with one or two late endorsements, perhaps the day of trial. Others deal with failure to endorse the name of witnesses on retrial following appeal. This obviously is not the petitioner's situation. In connection with 18 U.S.C.A. §3432 it has been suggested that failure to provide a list of witnesses in a capital case is ordinarily reversible error. Hall v. U.S., 410 F.2d 653, cert. denied 396 U.S. 970 (C.A. Va. 1969). Regardless of considerations relevant to federal statutory interpretation, error and prejudice

must be determined on a case by case basis. Again, this case demonstrates a level of prejudice that is extreme. The conviction is worthless.

III

Initially it should be reiterated that the petitioner feels that the conduct of the state in plea negotiations alone should have precluded pursual of the death penalty. However, should such a thing be possible under a hesitating application of due process, it would require more timely formal notice and the opportunity of the accused to raise the state's previous offer in plea negotiations as evidence of mitigation. It could hardly be argued that this would foster plea bargaining in bad faith. The accused's life would still be in jeopardy. A jury might easily view such a mitigating circumstance as insufficient to preclude the ultimate penalty. Prosecutors need hardly fear that their conduct will be viewed with the same degree of skepticism by the public that it should be subjected to within the judicial process.

The public interest is not served by a prosecuting attorney who will approach a defendant in an apparent guise of compassion and leniency and then abruptly demand his life in order to curry favor with volitile public opinion. The petitioner suggests that the image and reputation of an elected official should count for little when a man's life is in the balance. If §565.006.2 RSMo. is to be interpreted to preclude such information as being contrary to "the laws of evidence" it indeed permits imposition of the death penalty in an arbitrary and capricious manner.

The authority in favor of the petitioner's position on this issue is overwhelming. The circumstances of the plea arrangements were central to the petitioner's character and record. The laws of evidence may not be applied mechanistically

to defeat the ends of justice. See: Green v. Georgia, 442 U.S. 95 (1979); Chambers v. Mississippi, 410 U.S. 284 (1973); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 431 U.S. 633 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976).

IV

As noted previously, the validity of the petitioner's pleas on September 10, 1978, were contingent upon an event which never took place, that is, a plea of guilty to the offense now before this Court. Assuming arguendo, but of course not conceding, no invalidity due to untimeliness of notice, the petitioner had the following admissible history: a manslaughter conviction and a robbery conviction in 1971 for which he received a sentence of nine (9) years to be served concurrently (L.F. 58-59; T. 340-42, 346-47, 350).

The petitioner contends that the words "substantial history" and "serious assaultive criminal convictions" §565.012.2(1) RSMO (1978), are too vague and nonspecific to be applied evenhandedly by a jury. Whether the petitioner's history meets this legislative criterion is a highly subjective issue which leaves his fate utterly to whim and conjecture.

The petitioner's case is indistinguishable from Arnold v. State, 236 Ga. 534, 224 S.E.2d 386, 391-92 (1976). In the context of the imposition of a sentence of death such latitude of discretion cannot withstand constitutional scrutiny. See also: Smith v. Goguen, 415 U.S. 566, 572 (1974); Grayned v. City of Rockford, 408 U.S. 104, 109 (1971); Coates v. Cincinnati, 402 U.S. 611 (1971); Gelling v. Texas, 343 U.S. 960 (1952); Furman v. Georgia, 408 U.S. 238 (1971).

The Court is additionally referred to the opinion of Seiler, J., Bardgett, J., concurring, State v. Stokes, supra, 725.

V

The above authority is applicable to the petitioner's challenge to §565.012.2(7) RSMo (1978), allowing imposition of death upon a finding that "the offense was outrageously or wantonly vile in that it involved torture or depravity of mind." Regardless of construction on appellate review, the above instruction is what the jury uses to impose sentence. Second-guessing upon appellate review is no substitute for clear-cut objective criteria in sentencing instructions in the first instance. Such an instruction does not provide specific and detailed guidance.

Under such an instruction death may be imposed either upon a finding of forture, i.e. aggravated battery or depravity of mind. Thus, whether death is imposed on a proper basis or not is left purely to the speculation of appellate courts. In every case decided under such an instruction, the distinct possibility arises that death was imposed on an arbitrary and capricious basis.

In the present case there was no evidence that "depravity of mind" was attributable to the mental state which lead to the petitioner's alleged offense. "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions." Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980).

Because of vagueness, ambiguity and lack of specificity, this instruction cannot withstand constitutional due process scrutiny. The Court is requested to reconsider its holding in Gregg v. Georgia, supra, in light of the authority and standards set forth previously and the trend implied in Godfrey, supra.

Clear-cut definitions and standards will not prejudice the state.

VI

The petitioner includes §565.012.2(4) RSMo (1978): that ". . . the offender committed the offense of capital murder for himself or another, for the purpose of receiving money or any other thing of monetary value," in his challenge on the preceding basis. On a plain meaning interpretation the section is clearly meant to refer to contract murder or murder for hire. As it is applied it permits a sentence of death on a finding of felony-murder or murder first degree which is not a capital offense. Compare §565.003 RSMo (1978), which is punishable under §565.008.2 by life imprisonment only:

> "First degree murder defined.—Any person who unlawfully kills another human being without a premeditated intent to cause the death of a particular individual is guilty of the offense of first degre murder if the killing was committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, or kidnapping."

This situation does not amount to an objective standard. It is inherently misleading and hence arbitrary.

VII

The petitioner challenges §565.012.2(9) on the basis that there was no admissible evidence upon which the jury could base such a finding. Additionally, the petitioner suggests that while murder committed in the course of an escape may be a sufficient aggravating circumstance, its application to an individual who has completed such an offense is arbitrary and discriminatory and cannot support a sentence of death.

The petitioner challenges all of the aggravating circumstances found in his case on the basis that they establish an unreasonable classification, individuals accused of capital murder, and do not sufficiently guide a jury in making a reasonable determination of sentence. Thus, all of the above render imposition of death cruel and unusual punishment.

In connection herewith the petitioner urges this Court not to endorse the pyramid rationale of the Georgia Supreme Court in Zant v. Stephens, ___S.E.2d____(Ga. Oct. 27, 1982). It begs the issue. If one or more aggravating circumstances is found invalid, the entire fact finding process is rendered unreliable. Second guessing by appellate courts cannot extend to such an extent without violating due process, equal protection, and the Eighth Amendment.

VIII

The preceding leads the petitioner to challenge the death penalty on equal protection and Eighth Amendment grounds. It is clear that the supposed safeguards in application and review of this dangerous and ritualistic practice means nothing in the State of Missouri. A review of the principles in Furman v. Georgia, 408 U.S. 238 (1971), and Gregg v. Georgia, supra, is sought. The sequence of events in the petitioner's case give new meaning to the observation that "the magnitude of a decision to take human life is probably unparalleled in the experience of a member of a civilized society." Marion v. Beto, 434 F.2d 29, 33 (C.A. Tex. 1970). The tears of jurors in St. Louis County attest to this fact. It should cease.

C O N C L U S I O N

The Missouri Supreme Court, by ignoring the factors set out herein, did not correctly apply the prevailing standards of review on the constitutional questions presented in this petition. Also, the standard was incorrectly applied when the improper factors detailed were considered.

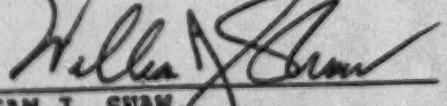
By omission or commission the Missouri Supreme Court has rendered decisions on federal questions which are in conflict with the principles pronounced by this Court and appellate courts of sister jurisdictions, Hall v. U.S., supra, (C.A. Va. 1969); Hussey v. LaValle, supra (D.C.N.Y. 1969); U.S. v. Waldman, supra, (C.A. Mass. 1978); Arnold v. State, supra, (Ga. 1976). For these reasons, the petitioner respectfully requests this Court to issue its writ of certiorari, based on the considerations contained in United States Supreme Court Rule 17.1(b) and (c).

Additionally, the facts of petitioner's cause are consistent with other cases detailed herein that have been granted review by this Court.

Finally, the prevailing standard in Missouri for the review of fundamental constitutional rights detailed herein is inconsistent with this Court's standards.

This Court's attention is required to ensure the State of Missouri's conformance with national standards of appellate review on the issues detailed herein.

Respectfully submitted,



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